

STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

OFFICE OF  
APPELLATE COURTS

MAY 16 2006

**FILED**

IMPLEMENTATION OF ITV PROTOCOL  
AND THE MINNESOTA RULES OF CRIMINAL PROCEDURE

**ORDER**

In October 1999, the Court approved the statewide use of interactive television ("ITV") in limited criminal matters on a pilot basis under the protocol previously approved by the Court for the Ninth Judicial District pilot project. The pilot protocol is set forth in Attachment A to this Order. In April 2006, the Judicial Council recommended the revised protocol set forth in Attachment B to this order ("proposed criminal ITV protocol"). Implementation of the proposed criminal ITV protocol potentially conflicts with provisions of the Minnesota Rules of Criminal Procedure, and avoidance of such conflicts is desirable. The Court is fully advised in the premises.

IT IS ORDERED:

1. The Supreme Court Advisory Committee on the Rules of Criminal Procedure shall review the proposed criminal ITV protocol set forth in Attachment B to this Order and shall recommend and comment upon draft rules implementing the protocol, if it is adopted by the Court, and shall report the recommended rule changes to the Court, along with any comments the committee may wish to make in regard to the protocol, on or before October 20, 2006.

2. All persons, including members of the Bench and Bar, desiring to submit written statements on the implementation of the criminal ITV protocol for consideration by the advisory committee on the rules of criminal procedure shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Minnesota Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, Minnesota 55155, on or before September 8, 2006.

DATED: May 16, 2006

BY THE COURT:

A handwritten signature in black ink, appearing to read "Russell A. Anderson", written over a horizontal line.

Hon. Russell A. Anderson  
Chief Justice

ATTACHMENT A  
STATE OF MINNESOTA, NINTH JUDICIAL DISTRICT

**PROTOCOL FOR THE USE OF ITV  
FOR CRIMINAL MATTERS IN THE DISTRICT COURT**

The following provisions will apply only to criminal matters that are part of the ITV pilot program in the Ninth Judicial District, and will be used only when doing so will best serve the interests of justice:

**1. General Provisions.**

In specified criminal actions and proceedings, the Court may conduct hearings and admit oral testimony communicated to the Court on the record by live audio-visual means in order to:

- a. ensure timely judicial access where distance and insufficient judicial resources delay case processing
- b. provide judicial coverage in the event of an emergency due to illness of a judge, inclement weather or other impediment
- c. allow witness testimony from distant locations.

**2. Definitions.**

The following terms used throughout this protocol are defined as follows:

- a. ITV – interactive video teleconference
- b. terminal site – any location where ITV is used for any portion of a court proceeding
- c. venue county – the county where pleadings are filed and hearings are held under current court procedures

**3. Approved Case Types.**

**Felony and Gross Misdemeanor**

ITV may be used to conduct the following criminal hearings when it is not reasonably possible for a judge to handle the matters on-site:

- a. Rule 5 and Rule 6 Hearings

A defendant in custody may be brought before any judge of the district by ITV for a Rule 5 or Rule 6 hearing if no judge is available in the venue county.

- b. Rule 8 and Rule 13 Hearings

A defendant may be brought before any judge of the district by ITV for a Rule 8 or Rule 13 hearing if no judge is available in the venue county. No plea of guilty may be taken.

c. Rule 11 Hearings

A defendant may be brought before an available judge of the district by ITV for the purpose of waiving an omnibus hearing.

ITV may not be used to conduct a trial, sentencing, contested omnibus hearing or any other contested matter except as provided herein.

**Misdemeanor**

A defendant may be brought before any available judge of the district by ITV for any of the following:

- a. Arraignment
- b. Plea
- c. Sentencing

Trials, contested pretrial hearings or other contested hearings may not be conducted by ITV except as provided herein.

**Petty Misdemeanor and Criminal Offenses Deemed Regulatory Offenses**

A defendant may be brought before any available judge of the district by ITV for all hearings, including trials, related to petty misdemeanors and those criminal offenses deemed to be regulatory offenses.

**4. Special Provisions.**

a. Rights Advisory/Waiver Form

Each defendant will be given an ITV rights advisory/waiver form upon arrest and detention, or upon first appearance before a judge, whichever occurs first. When a hearing by ITV is scheduled and the defendant is to appear by summons, the rights advisory/waiver form will be mailed or otherwise delivered to the defendant together with the notice of hearing.

b. Request for Rehearing

When a defendant appears before the Court by ITV for a Rule 5 or Rule 6 hearing, the defendant may request to appear in person before a judge. The hearing will be held *de novo* within three business days of the ITV hearing.

c. Consents

In all proceedings other than a Rule 5 or Rule 6 hearing the defendant, defense attorney, prosecuting attorney and the presiding judge must consent to holding

the hearing by ITV. If the defendant's attorney is a public defender, the district's chief public defender or his or her designee must also consent.

d. Multi-county Violations

When a defendant is charged in more than one county with like or similar offenses, all of the pending charges from the various counties may be disposed of in a consolidated hearing held by ITV before any available judge of the district.

## **5. Standard Procedures.**

In any proceeding conducted by ITV under this section:

- a. Parties who are entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant electing to appear by ITV shall give notice to the Court and to other parties of the terminal site location from which the appearance will be made.
- b. Witnesses may appear by ITV at all hearings, including contested matters.
- c. Regardless of the physical location of any party to the ITV hearings, any waiver, stipulation, motion, objection, decision, order or any other action taken by the Court or a party at an ITV hearing has the same effect as if done in person.
- d. All hearings will be conducted in a courtroom or other room reasonably accessible to the public.
- e. If the hearing requires a written record, a court reporter shall be in simultaneous voice communication with all ITV terminal sites, and shall make the appropriate verbatim record of the proceeding as if heard in person.
- f. The court administrator of the venue county will keep court minutes and maintain court records as if the proceeding were heard in person.
- g. All proceedings held by ITV will be governed by the Minnesota Rules of Criminal Procedure, the General Rules of Practice and state law, except as herein provided.
- h. Courtroom decorum during ITV hearings will conform to the extent possible to that required during traditional court proceedings. This may include the presence of one or more bailiffs at any ITV site.

## **6. Location of Participants.**

During the ITV hearing:

- a. The defendant's attorney shall be present at the same terminal site from which the defendant appears, except in unusual or emergency circumstances, and then only if all parties agree on the record.
- b. The judge may be at any terminal site.
- c. The prosecutor may be at any terminal site.
- d. The court clerk shall be in the venue county unless otherwise authorized by the presiding judge.

- Adopted by the Ninth District Protocol Committee 11-23-98. Adopted by the Ninth District Bench 1-29-99.

DISTRICT COURT

NINTH JUDICIAL DISTRICT

Defendant.

Signature of the Defendant

**ATTACHMENT B  
STATE OF MINNESOTA**

**PROPOSED PROTOCOL FOR THE USE OF ITV  
FOR CRIMINAL MATTERS IN THE DISTRICT COURT**

**Preamble**

Although in-person hearings in criminal cases are preferred, service to defendants, other parties and the public may be enhanced by the use of interactive video in specified criminal matters. The opportunity for more timely access to the court (e.g., for earlier appointment of counsel and review of release conditions), options for less costly appearances by witnesses, and more efficient use of judicial resources are some of the potential benefits.

1. **General Provisions.** In specified criminal actions and proceedings, the Court may conduct hearings and admit oral testimony communicated to the Court on the record by live audio-visual means.
2. **Definitions.** The following terms used throughout this protocol are defined as follows:
  - a. ITV – interactive video teleconference;
  - b. terminal site – any location where ITV is used for any portion of a court proceeding;
  - c. venue county – the county where pleadings are filed and hearings are held under current court procedures
3. **Approved Case Types.**
  - a. **Felony and Gross Misdemeanor.** ITV may be used to conduct the following criminal hearings:
    - i. **Rule 5 and Rule 6 Hearings.** A defendant in custody may be brought before any available judge of the district by ITV for a Rule 5 or Rule 6 hearing if no judge is available in the venue county.
    - ii. **Rule 8 and Rule 13 Hearings.** A defendant may be brought before any available judge of the district by ITV for a Rule 8 or Rule 13 hearing if no judge is available in the venue county.
    - iii. **Rule 11 Hearings.** A defendant may be brought before any available judge of the district by ITV for the purpose of waiving an omnibus hearing.
    - iv. **Restitution Hearings.** A defendant being held in another county may be brought before any available judge of the district by ITV for a restitution hearing.
    - v. **Other.** Any hearing where the court and parties agree

- b. **Misdemeanor.** A defendant may be brought before any available judge of the district by ITV for any of the following:
    - i. Arraignment;
    - ii. Plea;
    - iii. Sentencing;
    - iv. Restitution hearing;
    - v. Any hearing where the court and parties agree.
  - c. **Petty Misdemeanor and Criminal Offenses Deemed Regulatory Offenses.** A defendant may be brought before any available judge of the district by ITV for all hearings, including trials, related to petty misdemeanors and those criminal offenses deemed to be regulatory offenses or administrative offenses.
4. **Request for rehearing/in person hearings.**
- a. **Rule 5 or Rule 6 Hearing.** When a defendant appears before the Court by ITV for a Rule 5 or Rule 6 hearing, the defendant may request to appear in person before a judge. If the request is made, the hearing will be held within three business days of the ITV hearing and shall be deemed a continuance of the ITV hearing.
  - b. **Other Hearings.** In all proceedings other than a Rule 5 or Rule 6 hearing the defendant, defense attorney, or prosecuting attorney may submit an objection in writing on or before the time of the hearing to request to appear in person. The presiding judge shall determine whether the objection is granted.
  - c. **Multi-county Violations.** When a defendant has pending charges in more than one county within a district, any or all appearances authorized in this protocol may be heard by ITV by any judge of that district. Cases from other districts may be heard upon any necessary Supreme Court authorization.
5. **Standard Procedures.** In any proceeding conducted by ITV under this section:
- a. Parties who are entitled to be heard shall be given prior notice of the manner and time of the proceeding. Any participant other than the court electing to appear by ITV at a terminal site other than the venue county shall give notice to the Court and to other parties of the terminal site location from which the appearance will be made. The court and counsel shall use reasonable efforts to confer with one another in scheduling ITV hearings or proceedings so as not to cause, delay or create scheduling conflicts. Unless otherwise ordered by the court, a participant electing to appear at a terminal site other than the venue county, or the party on whose behalf the participant is appearing, shall be responsible for any additional use or other fees over and above those normally incurred by the court in the venue county in connecting from one court site to another court site within the judicial district or collaboration area.



- b. Witnesses, victims and other interested persons may, subject to the constitutional rights of the defendant, testify by ITV at all hearings, including contested matters.
- c. Regardless of the physical location of any party to the ITV hearings, any waiver, stipulation, motion, objection, decision, order or any other action taken by the Court or a party at an ITV hearing has the same effect as if done in person.
- d. The court administrator of the venue county will keep court minutes and maintain court records as if the proceeding were heard in person.
- e. All proceedings held by ITV will be governed by the Minnesota Rules of Criminal Procedure, the General Rules of Practice and state law, except as herein provided.
- f. Courtroom decorum during ITV hearings will conform to the extent possible to that required during traditional court proceedings. This may include the presence of one or more bailiffs at any ITV site.
- g. The court shall insure that the defendant has adequate opportunity to speak privately with counsel, including, where appropriate, suspension of the audio transmission and recording or allowing counsel to leave the conference table to communicate with the client in private.
- h. No recording shall be made of any ITV proceeding except the recording made as the official court record.

6. **Location of Participants.** During the ITV hearing:

- a. The defendant's attorney shall be present at the same terminal site from which the defendant appears, except in unusual or emergency circumstances, and then only if all parties agree on the record.
- b. Where the right to counsel applies, the use of ITV should not result in a situation where only the prosecutor or defense counsel is physically present before the judge unless all parties agree.
- c. Subject to part (b), the judge may be at any terminal site.
- d. Subject to part (b), the prosecutor may be at any terminal site.
- e. The court clerk shall be in the venue county unless otherwise authorized by the presiding judge.
- f. Witnesses, victims and other interested parties may be located at any terminal site that will allow satisfactory video and audio reception at all other sites.

7. **Equipment and Room Standards.**

- a. All hearings will be conducted in a courtroom or other room at the courthouse reasonably accessible to the public, either in person or via ITV. Restitution hearings

may be conducted in a reasonably accessible room at a location determined by the presiding judge.

- b. If the hearing requires a written record, a court reporter shall be in simultaneous voice communication with all ITV terminal sites, and shall make the appropriate verbatim record of the proceeding as if heard in person.
- c. To optimize picture clarity, the room should have diffused lighting (e.g., through louvered grids) and window shades to block external light. To optimize viewing, monitors should be placed in a darkened area of the room and be of sufficient size and number to allow convenient viewing by all participants. Cameras and microphones should be sufficient in number to allow video and audio coverage of all participants, prevent crowding of participants, facilitate security, and protect confidential communications. To minimize blurred video images, courts should use the highest affordable quality of cameras, processors, and transmission line speed, and the presiding judge shall control and minimize movement of participants.
- d. It is important to ensure that the presiding judge, counsel, witnesses and other participants speak directly into their microphones. This is particularly important for softly spoken persons. The presiding judge must advise parties to move closer and/or speak directly into microphones if this problem becomes apparent.
- e. Audio and visual must be synchronized and undistorted.

#### Drafting Committee Comments - 2006

The Preamble recognizes that the Confrontation Clause reflects a preference for face to face confrontation at criminal trials. *Maryland v. Craig*, 497 U.S. 836, 849, 110 S.Ct. 3157, 3165, 111 L.Ed.2d 666 (1990); *United States v. Gigante*, 166 F.3d 75 (2<sup>nd</sup> Cir. 1999); *State v. Sewell*, 595 N.W.2d 207, 212 (Minn.Ct.App. 1999) review denied Aug. 25, 1999; see AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, STANDARD 6-1.8(a) (Third ed. 2000) ("trial judge should maintain a preference for live public proceedings in the courtroom with all parties physically present"). In certain criminal proceedings where the confrontation clause is either not implicated or is waived or otherwise satisfied, the use of interactive video teleconference (ITV) may be an appropriate means to administer justice fairly, effectively and efficiently.

The typical ITV scenario envisioned by this protocol is that of a judge being in one terminal site such as a courtroom in county A, and the parties at another terminal site, such as a courtroom in county B. This has been the experience of the Ninth Judicial District in its pilot project, where the process has allowed judges to promptly handle proceedings in a different courthouse where a resident judge is not otherwise available. The success of the pilot project is reported in NATIONAL CENTER FOR STATE COURTS, COURT SERVICES DIVISION, ASSESSMENT OF THE INTERACTIVE TELEVISION PROGRAM IN THE NINTH JUDICIAL DISTRICT OF MINNESOTA (Sept. 1999).

Other possible scenarios where ITV use is contemplated include situations where the judge,

lawyers and defendant are at one terminal site in a courtroom and a witness or other participant is located at another terminal site (e.g. a hospital or a terminal site in another jurisdiction). The frequency of ITV use in such situations will likely be dictated by confrontation clause analysis (discussed further, below). For reasons of fairness, section 6.b. of the protocol discourages use of ITV in situations where the judge and prosecutor are at one terminal site such as a courtroom, and the defendant and defense counsel are at another terminal site, such as a jail, unless all parties agree.

To help meet the constitutional requirement of a probable cause determination within 48 hours of a warrantless arrest, *County of Riverside v. McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), section 3.a.i. of the protocol allows use of ITV for rule 5 and 6 hearings. These hearings encompass reading of charges, appointment of counsel, and establishing release conditions for all case types, and guilty/not guilty pleas in misdemeanor cases. Release conditions are the key because if the defendant is released, the 48-hour time limit for a probable cause determination does not apply. MINN.R.CRIM.P. 4.03, subd. 1.

Although a prior task force on ITV use recommended that there should be no ITV appearance without a meaningful, voluntary waiver of an in-person appearance by the defendant, *Final Report of the Minnesota Supreme Court Task Force on Closed Circuit Television*, Dec. 1991, at page 19 (S.Ct. file no. C0-91-1421), the vast majority of other jurisdictions known to use ITV in criminal matters (see summary of ITV use in other jurisdictions at end of these comments) currently authorize the use of ITV for rule 5 and 6 purposes without the defendant's prior consent. Section 4.a. of this protocol attempts to strike a balance between the need to meet constitutional probable cause requirements and a defendant's desire to have an in-person proceeding by allowing the defendant an automatic right to continue the rule 5 or 6 proceeding in-person, coupled with the requirement that the in-person portion of the hearing must be held within three days of the ITV proceeding.

The drafting committee is mindful of the concerns raised by public defenders of the potentially dehumanizing impact of the use of ITV particularly for minority and indigent defendants who are already vulnerable to biases inherent in our criminal justice system. In greater Minnesota, however, time, distance, and lack of judicial resources may pose a more serious threat to the fair administration of justice than in the metro area where time and distance are not an issue and racial disparity has been well documented. See, e.g., *Final Report, Minnesota Supreme Court Task Force on Racial Bias in the Judicial System*, May 1993, at pages 21-23. Thus the protocol merely authorizes, but does not mandate, the use of ITV. The extent to which the protocol is implemented in each judicial district is best left to the sound discretion of the trial bench.

Section 3.a.ii. also allows use of ITV for rule 8 and 13 hearings, which encompass reading of charges, pleas, and demand or waiver of omnibus hearing in felony and gross misdemeanor cases. Under section 4.b. of the protocol, any objection to use of ITV at a rule 8 or 13 hearing must be submitted in writing at or before the hearing, and the presiding judge has discretion to determine whether the objection will be sustained.

Section 3.a.iii. of the protocol authorizes waiver of omnibus hearings by ITV, and this waiver typically occurs at the rule 8 hearing. The omnibus hearing encompasses evidentiary issues, which may require testimony. Section 3.a.iv. authorizes use of ITV for such hearings if the court and parties agree.

Section 3.b. of the protocol permits wider use of ITV in misdemeanor and petty misdemeanor cases, as a defendant is authorized to appear by counsel in such cases under MINN.R.CRIM.P. 5.04, subd. 1, and there is no right to a jury trial in petty misdemeanors, which are not considered a crime. MINN.R.CRIM.P. 23.05-.06.

The requirement of notice of ITV sessions in section 5.a. is necessary in order to allow participants to object under section 4. This protocol presumes that the court as a scheduling matter will typically initiate use of ITV, with notice to the parties. Once a matter is scheduled as an ITV session, the protocol permits participants to elect the terminal site from which they will participate, subject to the limitations in section 6. Participants electing to appear at a terminal site other than the venue county must be aware that they, or the party on whose behalf they are appearing, will be responsible for any additional use or other fees over and above those normally incurred by the court in the venue county in connecting from one court site to another court site within the judicial district or the local telecommunications collaboration area. Thus, where a witness is to appear on behalf of the prosecution or defense from a terminal site other than the venue county, the prosecution or defense would be responsible for paying any additional costs required in connecting that terminal site to the venue county. If indigence of a party or participant is an issue in this regard, that matter is left to the sound discretion of the court.

Section 5.b. recognizes that witness testimony during an ITV session is subject to constitutional rights, such as a defendant's right to confront witnesses. In the typical ITV scenario envisioned by this protocol the witness would be physically present at the same site as the defendant. Where the witness is located at another site and the defendant objects, however, a confrontation analysis is required. Witness testimony by ITV in a criminal trial was upheld by the Minnesota Court of Appeals in *State v. Sewell*, 595 N.W.2d 207 (Minn.Ct.App. 1999) review denied Aug. 25, 1999. In this case the court found that ITV testimony of a witness who was under medical restriction not to travel because he was recovering from surgery for a broken neck was the functional equivalent of a videotaped deposition under R.Crim.P. 21. The court applied a confrontation clause analysis, indicating that once the unavailability of the witness and the necessity of the witnesses' testimony have been established, the reliability of the testimony is determined by looking at four features:

The salutary effects of face-to-face confrontation include:

1. the giving of testimony under oath;
2. the opportunity for cross examination;
3. the ability of the fact finder to observe demeanor evidence; and
4. the reduced risk that a witness will wrongfully implicate an innocent defendant when testifying in his presence.

*Id.* at 595 N.W.2d 212-213. It should be noted, however, that the United States Supreme Court rejected on confrontation grounds a proposal to modify FED.R.CRIM.P. 26 allowing witness testimony by ITV when: (1) the requesting party establishes compelling circumstances for ITV testimony; (2) appropriate safeguards for the ITV transmission are used; and (3) the witness is unavailable within the meaning of rule 804(a)(4)-(5) of the Federal Rules of Evidence. 71 CRIM. LAW REPORTER No. 5 at 133 (BNA 2002) (comments of Justice Scalia).

Witnesses testifying from another state or nation raise special confrontation clause concerns because an oath is only effective if the witness can be subjected to prosecution for perjury upon making a knowingly false statement. *See, e.g., Harrell v. State*, 709 So.2d 1364, 1371 (Fla. 1998) *cert. den.* 525 U.S. 903, 119 S.Ct. 236, 142 L.Ed.2d 194 (1998) (permitting foreign tourists assaulted and robbed while visiting Florida to testify from Argentina by satellite; court found that extradition treaty between the United States and Argentina subjected the witnesses to a potential perjury prosecution), cited with approval in *State v. Sewell, supra*, at 595 N.W.2d 212.

Reliability can also be affected by off-camera activity. The U.S. Navy-Marine Corps Court of Criminal Appeals decided in *U.S. v. Shabazz*, NCMCM 98 00309 (Nov. 5, 1999), that the defendant's sixth amendment confrontation rights were violated when the witness was coached by an off-camera person.

The emphasis on decorum in section 5.f. recognizes that rules of decorum such as Minn.Gen.R.Prac. 2.01-2.03 encompasses not only acceptable standards of behavior and procedural formalities, but the physical dignity of the courtroom, including display of flags and appropriate attire. A terminal site that lacks the physical dignity of a courtroom should be avoided because it has the potential for fostering disrespect for the criminal justice process. AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE, STANDARD 6-1.8(d) (Third ed. 2000).

The requirement in section 5.g. that the defendant and the defendant's counsel must be provided adequate opportunity to speak privately is related to the requirement in section 6.a. that the defendant and defendant's attorney must be located at the same terminal site (except in rare cases and then only upon agreement of all parties) is necessary to ensure that the defendant's right to counsel are not infringed. An identical requirement has been imposed for use of ITV in commitment proceedings. Rule 14, Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act.

The prohibition on recording ITV sessions set forth in section 5.h. is identical to that applicable to telephone hearings under Minn.Gen.R.Prac. 115.09. This requirement is consistent with the directives of the Minnesota Supreme Court regarding use of cameras in the courtroom. *See In re Modification of Section 3A(10) of the Minnesota code of Judicial Conduct*, No. C4-87-697 (Minn.S.Ct. filed April Jan. 11, 1996) (order reinstating experimental program for audio and video coverage of trial court proceedings); *Order for Interactive Audio-Video Communications Experiment in First Judicial District-Mental Illness Commitment Proceedings*, No. C6-90-649 (Minn.S.Ct. filed April 5, 1995); *Order Re Interactive Audio-Video communications Pilot Program in Third Judicial District Mental Illness commitment Proceedings*, No. C6-90-649 (Minn.S.Ct. filed Jan. 29, 1999); *Order for Interactive Audio and Video Communications, Fourth Judicial District, Mental Health Division, Price and Jarvis Proceedings*, No. C6-90-649 (Minn.S.Ct. filed April 8, 1991). Courts will have to ensure that this prohibition is understood, particularly where an ITV session involves a terminal site that is not a courtroom under the control of the state courts.

Section 6.b., which discourages use of ITV where only the prosecutor or defense counsel is physically present before the judge unless all parties agree, is taken from AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE, SPECIAL FUNCTIONS OF THE TRIAL JUDGE,

STANDARD 6-1.8(d) (Third ed. 2000). Commentary to ABA Standard 6-1.8(d) explains that the presence of only the prosecutor or the defense counsel physically with the judge raises fairness and perhaps even due process issues based on the appearance of undue influences. Thus, where feasible, the prosecutor and defense counsel should appear before the court in the same fashion. Moreover, both defense lawyers and prosecutors have also stressed to the drafting committee the importance of a "meaningful appearance" where the lawyers can discuss the case, the client is there, and often a resolution occurs. If the prosecutor and defense counsel are at different locations, however, resolution of cases may be delayed.

There have been several situations in the Ninth Judicial District pilot project where a defendant charged with a relatively minor type of offense has been eager to proceed with a rule 5 or 6 hearing via ITV rather than spend the better part of a weekend in jail until a judge is physically present in the county. The presence of a prosecutor, via ITV or otherwise, has also been rare in such cases, resulting in a judge-to-defendant only ITV proceeding, with the defendant ultimately being released rather than waiting in jail for the better part of a weekend. The same benefits may be possible even when a prosecutor and defense lawyer are involved at such an early stage, and thus section 6.b. of the protocol allows the parties to agree to use of ITV when they feel the advantages outweigh any perceived fairness concerns.

Section 7.a. recognizes that public access must be considered when arranging ITV sessions. The public should be permitted to attend the session from any courtroom terminal site where one or more of the participants are physically present. The protocol recognizes that there may be situations where one terminal site is not physically suitable for live public presence, and section 7.a. requires public access to that site via ITV in some other room that is reasonably accessible to the public. *See, e.g., In Re: Detention Center Arraignments, Washington County* (Minn.S.Ct. April 26, 1996) (order permitting temporary use of ITV from detention center during court facility remodeling; judge, attorneys, and defendant present in arraignment room; family members victims, advocates, probation officers, and others permitted to view proceedings via ITV from another room in detention facility and then brought to arraignment room to provide information or testimony in presence of judge and defendant if necessary).

Sections 7c-7e of the protocol are based on the collective experience of Minnesota courts and agencies that have implemented ITV. Presiding judges may also want to alert participants to the very slight time delay that may occur between questions and answers during an ITV session.

## Use of ITV in Criminal Matters in Other Jurisdictions

ALASKA.R.CRIM.P. 38.2(b) (in custody defendants shall appear by ITV in traffic and misdemeanor cases for arraignment, pleas, non-evidentiary bail reviews, and, with defendant's consent, sentencing; in felony cases for initial appearance hearings, non-evidentiary bail reviews, and not guilty plea arraignments, unless otherwise ordered for cause; in all cases court may order in person hearing upon finding that defendant's rights would be prejudiced by use of ITV).

ARIZ. R. CRIM. P. 1.6 (at court's discretion ITV can be used in initial appearance and not guilty arraignments, for other ITV use written stipulation of parties including that defendant knowingly, voluntarily and intelligently agrees to appear; no ITV use in trial, evidentiary hearing, probation revocation hearing, or felony sentencing).

ARK. reports that there is no specific authority for the use of ITV (in absence of the defendant's consent) but some courts may use it for first appearance, plea and arraignment and other such pretrial/preliminary hearings. Email from John Millar, attorney, Administrative Office of the Courts, to Devin Hallin, Office Assistant, State Court Administrator's Office (Nov. 2005). Little Rock Municipal Court uses ITV in bail review proceedings if defense attorney consents. Telephone interview with Mike Kindle, Little Rock Municipal Court Probation (Jan. 16, 2001). ARK. CODE § 16-43-4004, which deals with closed circuit testimony in criminal cases where children 12 and under are involved

CAL. PENAL CODE § 977, 977.1, 977.4 (if defendant agrees, may appear by ITV in misdemeanor and felony for initial appearance, arraignment, and plea, but in domestic violence cases court may order appearance for service of process; if incarcerated in state, county, or local facility, initial appearances and arraignments may be conducted by ITV without defendant's consent).

COLO.R.CRIM.P. 43(e) (ITV may be used for first appearance for purpose of advisement and setting of bail, further appearances for purposes of filing charges or setting preliminary hearing, and unless defendant objects, hearings to modify bail).

CONN. reports that currently there is no use of video technology in criminal cases, although it is used in habeas corpus proceedings. Email from Larry D'Orsi, Deputy Director, Criminal Courts Operation, to ITV Subcommittee staff Mike Johnson (Jan. 2, 2001).

DEL. CT. COMMON PLEAS R.CRIM.P. 10(b) (closed circuit television may be used for arraignments); 43(c)(6) (for Title 21 offense, other traffic offense, a class B or unclassified misdemeanor or a violation, with the consent and waiver of the defendant's appearance, the Court may permit in custody arraignment and/or plea by video phone and impose sentence. DEL. JUSTICE OF PEACE CT. R.CRIM.P 4 (ITV may be used for issuance of warrant).

FLA.R.CRIM.P. 3.130, 3.131, 3.160, and 2.071 (ITV may be used in discretion of court for first appearance and arraignment; bail modifications in felony matters must be in-person; county and circuit judges may take testimony by ITV if defendant makes informed waiver of any confrontational rights that may be abridged by use of ITV).

GA. CODE ANN. § 17-4-47 (video conference may be used to conduct hearings relating to arrest warrant applications and issuance of an initial bond connected with an offense for which an arrest warrant was issued).

HAWAII R. PENAL PROC. 10, 43, (allows use of video teleconferencing for arraignment if defendant waives right to be present); HAWAII R. EVID. 616 (allows use of closed circuit video for testimony of child in any prosecution of an abuse offense or sexual offense alleged to have been committed against a child less than eighteen years of age at the time of the testimony)

IDAHO R.CRIM.P. 43.1 (electronic audio visual devices may be used in the discretion of the district judge or magistrate for a first or subsequent appearance, bail hearing, arraignment and plea in a misdemeanor case, or arraignment and plea of not guilty in a felony case).

INDIANA ADMIN. R. 14 (allows use of video telecommunications for: initial hearings including any probable cause hearing; determination of indigence and assignment of counsel; amount and conditions of bail; setting of omnibus date; pre-trial conferences; taking of a plea of guilty to a misdemeanor charge; sentencing hearings when the defendant has given a written waiver of his or her right to be present in person and the prosecution has consented; with the written consent of the parties, post-conviction hearings; and any other hearing or proceeding in which the parties waive their rights of appearance).

KAN. CRIM. PROC. CODE §§ 22-2802 (11); 22-3205 (b); 22-3208 (7); 22-3717 (j); 38-1632 (g)(allows ITV use in discretion of court for review of release conditions, arraignment, motion hearings, parole board proceedings; juvenile detention hearings, and juvenile pre-trial hearings; adult defendants must be informed of the right to be personally present in the courtroom during these proceedings and exercising their right to be present shall in no way prejudice the defendant).

KENT. *Commonwealth of Kentucky v. Ingram* at 46 S.W.3d 569 (Ky. 2001) (allows use of ITV for arraignments, and consent of defendant is not required). ITV also used for testimony by chemists from the six state crime labs. Email from Sarah Dent, Administrative Office of the Courts, to ITV Subcommittee staff Mike Johnson (Jan. 11, 2001).

LA. R. FOURTH JUD. DIST. XXXI (Ouachita Parish; appearance before a judge under C.Cr.P. Art. 2300.1, and arraignment under C.Cr.P. Art 551, may be either in person or by simultaneous transmission through audio-video electronic equipment).

MAINE R.CRIM.P. 5 (initial appearance by ITV in the discretion of the court).

MASS. reports that ITV is used for arraignments, criminal complaint hearings, pre-trial conferences, hearings to order psychological exams, and probation violation hearings. There are no statutes that permit use of video conferencing. It is left to the discretion of the local courts, some of which require a waiver from the defendant and defense attorney. E-mail from Theresa Gillis, Court Program Manager of Video Conferencing, Administrative Office of the Trial Court of Massachusetts, to Devin Hallin, Office Assistant, State Court Administrator's Office( Nov. 2005); Email from Bill Letendre, Court Program Manager, Administrative office of the Trial Court, to ITV Subcommittee staff Mike Johnson (Jan. 2, 2001); MASSACHUSETTS TRIAL COURT ADMIN. OFFICE OF THE TRIAL COURT, PLANNING AND DEVELOPMENT DEPT., VIDEO CONFERENCING JULY - SEPTEMBER 2000 (2000).



MICH. ADMIN. ORDER 2000-3 (July 18, 2000; file no. 89-44) (State Court Administrator authorized to approve the use of two-way interactive video technology between a courtroom and a prison, jail, or other place of detention for: initial arraignments on the warrant, arraignments on the information, pretrials, pleas, sentencing for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations; Model Local Administrative Order 13 provides that local Judge/Magistrate has the sole discretion to terminate or suspend an interactive video proceeding once initiated and to require that the defendant be brought physically before the court); *compare* MICH. COMP. LAWS § 767.37a (unless the defendant requests physical presence before the court, allows use of 2-way closed circuit television for initial criminal arraignments and the setting of bail between a court facility and a prison, jail, or other place where a person is imprisoned or detained; does not prohibit use of 2-way closed circuit television for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use).

MO. REV. STAT. § 561.031 (for persons held in custody, personal appearance may be made by means of two-way audio-visual communication for: first appearance before an associate circuit judge on a criminal complaint; waiver of preliminary hearing; arraignment on an information or indictment where a plea of not guilty is entered; arraignment on an information or indictment where a plea of guilty is entered upon waiver of any right such person might have to be physically present; any pretrial or post-trial criminal proceeding not allowing the cross-examination of witnesses; sentencing after conviction at trial upon waiver of any right such person might have to be physically present; sentencing after entry of a plea of guilty; and other appearances via closed circuit television upon waiver of any right such person held in custody or confinement might have to be physically present).

MONT. CODE ANN. §§ 46-7-101 (initial appearance by ITV in court's discretion); 46-9-201 (bail by ITV in court's discretion); 46-9-206 (bail by ITV in court's discretion); 46-12-201 (arraignment by ITV in court's discretion); 46-12-211 (plea agreement disclosure by ITV if no party objects); 46-16-105 (guilty plea by ITV if no party objects and court agrees); 46-17-203 (misdemeanor guilty plea if no party objects and judge agrees); 46-18-102 (render judgment and sentencing by ITV if no party objects and court agrees); 46-18-115 (sentencing by ITV if no party objects and court agrees).

NEB. is currently developing rules for ITV use . E-mail from Janice Walker, Nebraska State Courts to Sue Dosal, State Court Administrator (Nov. 2005).

NEVADA reports that Clark County (Las Vegas area) Justice Center uses ITV routinely for arraignments without the consent of the defendant. (Source: Nov. 2005 Survey Response). Statutes also authorize ITV use in preliminary examinations and grand jury proceedings if the witness is 500 miles away or has a medical condition preventing attendance, NEV. REV. STAT. §§ 171.1975, 172.138 (2005), and out of state witnesses may testify by ITV in child support matters. NEV. REV. STAT. §§ 125A.285, 130.316, 425.3832 (2005).

N.J. Mun. Ct. R 7:8-7(a) (authorizes appearance of defendant by ITV as approved by the Administrative Office of the Courts); N.J. reports that ITV may be used for bail review/arraignment proceedings with the defendant's consent. (Nov. 2005 Survey Response).

N.M. R. CRIM. P. 5-303(H) (two-way audio-visual communication may be used for arraignment or first appearance if the defendant and the defendant's counsel are together in one room, the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public, and no plea is entered except a plea of not guilty).

N.C. GEN. STAT. §§ 15A-532 (Any proceeding to determine, modify, or revoke conditions of pretrial release in a noncapital case may be conducted by an audio and video transmission; upon motion of the defendant, the court may not use an audio and video transmission); 15A-941 (arraignment in a noncapital case may be conducted by an audio and video transmission).

N.D. SUP. CT. ADMIN. R. 52 (2005) (allows court wide use of ITV for all hearings, conferences, and other proceedings in criminal cases; only limits are: defendant may not plead guilty or be sentenced via ITV unless the parties consent; and a witness may not testify by ITV unless defendant knowingly and voluntarily waives his or her right to have the witness testify in person; in a guilty plea proceeding, the court may not allow the defendant's attorney to participate from a site separate from the defendant unless the court: finds that the attorney's participation from the separate site is necessary; confirms on the record that the defendant has knowingly and voluntarily consented to the attorney's participation from a separate site; and allows confidential attorney-client communication, if requested.).

OHIO R. CRIM. P. 10(b) (arraignment by ITV with consent of parties if not guilty plea entered); *State v. Phillips*, 74 Ohio St. 3d 72, 656 N.E.2d 643 (1995) (rule does not violate due process).

ORE. UNIF. TR. CT. R. 4.080 (incorporating sections 4-12 of 2005 Enrolled House Bill 2282) (court may direct defendant to appear by simultaneous electronic transmission –includes ITV--- in bail review/arraignment proceedings, to enter a guilty plea, for in-custody inmates, for judgment/sentencing, and for probation violations; requires private communication with counsel and ability of judge and defendant to see each other; but a person may not appear before the jury by e-appearance). Survey Response also noted that Oregon courts also use ITV for oral and sign language interpretation in court proceedings.

42 PA. CONS. STAT. §§ 8703 (allows court discretion to hold arraignment by two-way electronic audio-video communication); 5985 (allows a child victim to testify by closed circuit television). PA. R. CRIM. P. 118 (may use ITV for post-sentence motions, bail hearings, extradition hearings, and Gagnon I hearings, but not for other preliminary hearings, trials, sentencing, revocation, or hearings where defendant has a constitutional or statutory right to be physically present), 540 (court has discretion to hold preliminary arraignments by ITV) and 571 (court has discretion to hold arraignments by ITV).

RHODE IS. R. CRIM. P. 5 (initial appearance by ITV in discretion of court when state opposes bail); 7 (waiver of indictment by ITV with leave of court and consent of prosecutor); 10 (arraignment by ITV in discretion of court); may be used in bail review/arraignment proceedings. Survey response also indicated that ITV may also be used in determination of attorney, probation review and motion to withdraw.

SOUTH CAROLINA: ITV may be used in bail review/arraignment proceedings. The consent of the defendant is required, and the defendant may “opt out.” The consent of the prosecutor is not

required. It may also be used in the following proceedings: non-capital initial appearances; bond hearings; preliminary hearings; contested motions; and, acceptance of guilty pleas and sentencing (for offenses initially within court of limited jurisdiction: initial appearances, bond hearings, probation revocations, contested motions, and acceptance of guilty pleas and sentencing in our court of general jurisdiction.) *Legal Authority:* Authority created in courts of limited jurisdiction statewide by Order dated August 2003. Authority created in courts of general jurisdiction by Order dated June 2005.

SO.DAK. 2005 survey response indicates that ITV may be used in bail review/arraignment proceedings. The consent of the defendant is **not** required. The defendant may “opt out.” The consent of the prosecutor is **not** required. *Legal Authority:* No SD statutes or court rules specifically address this, but legal research found it permissible under existing statutes and caselaw. reports one judge using ITV on a regular basis on criminal arraignments based on a mutual consent. Email from D.J. Hanson, State Court Administrator, to ITV Subcommittee staff Mike Johnson (Jan. 10. 2001).

TENN. R. CRIM. P. 43(d), (e) (initial appearance by ITV in court’s discretion if the use promotes the purposes of the rules, allows the judge and defendant to communicate with and view each other simultaneously, permits discussions to be heard by the public, and does not involve the defendant’s entry of a guilty plea; same applies to an arraignment, in the absence of objection by the defendant).

TEX. CRIM. PROC. CODE ANN. Tit. 1, Chap. 27, Art. 27.18 (Vernon 2005) (Plea or Waiver of Rights by ITV with consent of the defendant and prosecutor); TEX. CRIM. PROC. ANN. Tit 1, Chap. 15, Art 15.17 (Vernon 2005) (initial appearance).

UTAH CODE JUD. ADMIN. Rule 4-106 (In the judge’s discretion, any hearing may be conducted using telephone or video conferencing; applicable to all courts of record and not of record).

VERMONT ADMIN. ORDER NO. 38. (2005) (authorizes use in single county at judge’s discretion for in-custody proceedings). Survey response reports limited use for bail review/arraignments and for plea bargains in simple cases.

VIR. CODE ANN. §§ 19.2-3.1 (any appearance required or permitted before a magistrate, intake officer or, prior to trial, before a judge, may be by use of two-way electronic video and audio communication); 19.2-82 (probable cause determination may be made using two-way electronic video and audio communication).

WASH. SUP. CT. CRIM. R. 3.4 (Preliminary appearances, arraignments, bail hearings, and trial settings may be conducted by video conference; any party may request an in-person hearing, which may in the trial court judge’s discretion be granted; other trial court proceedings may be conducted by video conference only by agreement of the parties and upon the approval of the trial court judge pursuant to local court rule; In interpreted proceedings, the interpreter must be located next to the defendant); numerous local rules repeat the same, see, e.g., Wash. Crim. R. Courts of Lim. Juris. 3.4 (same). Survey response indicates that six of 31 districts use ITV in criminal cases for bail review/arraignments.

WIS. STAT. §§ 967.08-.09; 970.01; 971.04 (2005) (allows use of ITV for initial appearance if pleading not guilty, waiver of preliminary exams, waiver of competency proceeding, waiver of

jury trial, non-evidentiary bail and other release hearings, and non-evidentiary motions for severance, testing physical evidence, testing sufficiency of affidavits for arrest or search warrants, *in limine*, and to postpone; defendant may appear personally for good cause shown; physical presence otherwise required at arraignment, trial, during voir dire, any evidentiary hearing, any view by the jury, when the jury returns its verdict, and at the pronouncement of judgment and the imposition of sentence, except it may be excused in misdemeanor cases).

FED. R. CRIM. P. 5(f), 10(b), 43(a) (2005) allow use of ITV for initial appearances and arraignments if the defendant consents.